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SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 500.

THE UNION NATIONAL BANK OF WICHITA, KANSAS, A CORPORATION, APPELLANT,

VS.

CARL C. LAMB, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF IN BEHALF OF APPELLEE.

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CASES CITED

STATUTES AND OTHER AUTHORITIES

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OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri, Division No. 1, Union National Bank of Wichita, Kansas, vs. Lamb, No. 40684, is reported in 213 S. W. 2d 416, and appears in full in the record (R. 19-23). The case has not as yet been reported in the official Missouri Supreme Court Reporter.

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Appellee opposes the jurisdiction of this Court for the reasons and on the grounds set forth under point I of his brief and argument, *infra*.

STATEMENT OF THE CASE.

On December 8, 1927, the appellant recovered a judgment against appellee at Denver, Colorado, in the District Court for the Second Judicial District of Colorado (R. 3).

On October 27, 1945, seventeen years eleven months and eleven days later, the Colorado judgment was revived (R. 4).

The revival was upon notice mailed to the appellee in Kansas City, Missouri, and also delivered to appellee in Kansas City, Missouri, by a deputy sheriff of Jackson County, Missouri (R. 10, 12).

It is not contended that there had at any time been a payment entered of record upon the Colorado judgment.

This action upon the revived judgment was filed December 13, 1945, in the Circuit Court of Jackson County, Missouri, at Kansas City (R. 1).

Appellee contends that the Colorado judgment was and is barred by Section 1038, Missouri Revised Statutes, 1939, as was held by the Missouri Supreme Court, 213 S. W. 2d 416 (R. 19-23), and that this decision [illegible]ying recovery on the Colorado judgment did not deny full faith and credit to such judgment, and did not contravene Article IV, Section 1, of the Constitution of the United States.

SUMMARY OF ARGUMENT.

The appeal herein was applied for on December 13, 1948, which was the ninety-first day after appellant's motion for rehearing or transfer to the Court *en banc* was denied. The rules of this Court require that the appeal be applied for within the time allowed by statute (Rule 36) and the statute allows ninety days (Title 28, United States Code, Section 2101(c)). The last day of this ninety day period fell on Sunday. The Circuit Courts of Appeals have uniformly held that an appeal taken on the Monday following the last day limited by statute for appeal which falls on Sunday, is not timely. No controlling opinion of this Court has been found. It is, therefore, submitted that the appeal herein was not timely.

The decision of the Supreme Court of Missouri is in accord with the controlling decisions of this Court in applying its own statute of limitations to a suit on a foreign judgment. Therefore, this appeal presents no substantial Federal question and should not be allowed. Appellant has sought review herein by appeal, when, under the decisions of this Court, the proper remedy is by petition for writ of certiorari. Treating the appeal as an application for certiorari, as is authorized by statute, this is not a case where this Court should exercise its discretion and grant the writ, because of the lack of any substantial Federal question. Also, appellant is in serious default as to the service and filing of its brief. Therefore, it is submitted that the Court is without jurisdiction and should not consider the appeal herein on its merits.

The case at bar is a suit in Missouri on a judgment rendered against appellee in Colorado in 1927. This judgment was revived in Colorado in 1945 by service had on appellee in Missouri. The Supreme Court of Missouri ap-

plied the Missouri statute of limitations to this case and held that the action was barred. In so doing, the Missouri Supreme Court followed the generally accepted rule on the subject that the state of the forum may apply its own statute of limitations to a suit on a foreign judgment. This rule is based on early decisions of this Court which so held, and these decisions have been repeatedly cited and followed as controlling, down to the present time. This action of the Missouri Supreme Court did not contravene the full faith and credit clause of Article IV, Section 1, of the Constitution of the United States. It is, therefore, submitted that, if this appeal is considered on its merits, the decision of the Supreme Court of Missouri herein should be affirmed.

ARGUMENT.

I.

This Court Is Without Jurisdiction to Consider the Appeal Herein on Its Merits.

A.

The Appeal Herein Was Not Timely.

The opinion of the Supreme Court of Missouri in this case was handed down July 12, 1948 (R. 19). Appellant filed its motion for rehearing or for transfer to the Court *in Banc* within proper time (R. 23) and such motion was overruled on September 13, 1948 (R. 34). The appeal papers were filed with the Missouri Supreme Court and the appeal allowed on December 13, 1948 (R. 34-39).

Section 2101(c), Title 28, United States Code, provides:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall be taken or applied for within ninety days* after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days" (Emphasis added).

Before the recent revision of Title 28, U. S. C., the period was three months. The change to ninety days was made because it was considered by the revisers to be more specific. See Title 28, United States Code Congressional Service, Reviser's Notes, page 1899, published 1948 by West Publishing Company and Edward Thompson Company.

This statute requires that this appeal be taken or applied for within ninety days. Thus, the question of timeliness of the appeal turns on whether or not December 13, 1948, the day on which this appeal was taken, was within the ninety days allowed by statute for the appeal.

Although the opinion of the Missouri Supreme Court was handed down on July 12, 1948, the time for appeal did not begin to run until September 13, 1948, the date on which appellant's motion for rehearing or transfer to the Court *en banc* was denied. Excluding September 13, 1948, as must be done, see *Siegelschiffer* v. *Penn. Mut. Life Ins. Co.*, 248 Fed. 226; 3 Am. Jur. 143, Appeal and Error, Section 423, the last day of the ninety days allowed by the above statute for this appeal was December 12, 1948, which was a Sunday. Thus, the appeal herein, which was taken on Monday, December 13, was taken on the 91st day and was not within the time allowed by statute for such appeal.

Appellant contends that the last or 90th day being a Sunday, such day should be excluded from the time limited by statute within which an appeal is allowed, and the appeal which was taken on Monday, the 91st day, should be held timely. The authorities do not support this contention. No decision of this Court has been found which is in point on this question but it is axiomatic that this Court will examine its own jurisdiction even where the question is not raised by the parties, *Oneida Navigation Corporation* v. *W. & S. Job & Co.*, 252 U. S. 521, 64 L. Ed. 697; *Stevirmac Oil & Gas Co.* v. *Dittman*, 245 U. S. 210, 61 L. Ed. 248, and that jurisdiction cannot be conferred by waiver or consent of the parties but must appear from the provisions of law granting such jurisdiction. See *Mansfield, C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 28 L. Ed. 462; *Great Southern Fire Proof Hotel* v. *Jones*, 177

U. S. 449, 44 L. Ed. 842. However, numerous decisions of various Circuit Courts of Appeals have been found which construe the timeliness of appeals taken on Monday where the last day of the time for appeal as limited by statute fell on Sunday. These cases uniformly hold that such appeals are not timely and do not support the jurisdiction of the appellate court.

The earliest case found which involves this point is the leading case of *Johnson* v. *Meyers*, (1893) 54 Fed. 417, wherein the last day of the period of six months allowed by statute for an appeal fell on Sunday and the appeal was taken on the following Monday. The Court held that this appeal was not in time and it was therefore dismissed. The Court noted that there would of necessity be many Sundays included in the time for appeal and that there was no authority for excluding the first, the last, or any or all intermediate Sundays. After pointing out that Congress had, in other statutes, provided for the exclusion of all Sundays or allowed action on Monday when the last day of the time limit fell on Sunday, Judge Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, said:

> "These provisions clearly indicate that it was the understanding and intention of congress that all Sundays should be counted as part of the time limited within which an act is to be done under their legislation, unless they are excluded by express provision. Where the time limited for the performance of an act is less than seven days, where the unit of its measurement is the day, and there is reason to suppose that juridical days were intended by a statute or act of congress, there is reasonable ground for the holding that Sundays and legal holidays falling within such time should be excluded. *Hales* v. *Owen*, 2 Salk. 625; *Rex* v. *Elkins*, 4 Burrows 2130; *Thayer* v. *Felt*, 4 Pick. 354. But where the time limited is such that

one or more Sundays must fall within it, and there is no statute or act excluding any of them, it is certainly not the province of the court to extend the time fixed by excluding the last, the first, or any intermediate Sunday or holiday."

In *Meyer* v. *Hot Springs Imp. Co.*, 169 Fed. 628, the last day of the six months' period allowed by statute for taking appeals fell on Sunday and the appeal was not taken until the following Monday. Judge Gilbert, speaking for the Circuit Court of Appeals, Ninth Circuit, said:

"At common law, when Sunday is the last day of the time within which an act is to be performed under a contract, it is excluded, and performance on Monday is allowed. *Hammond* v. *American Mutual Life Ins. Co.*, 10 Gray (Mass.) 306; *Salter* v. *Burt*, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; *Pressed Steel Car Co.* v. *Eastern R. Co.*, 121 Fed. 609, 57 C. C. A. 635. So, in construing rules of court in respect to time for pleading and other matters of mere practice, if the last day fall on Sunday, the whole of the next day is allowed within which to perform the required act. *Anonymous*, 2 Hill (N. Y.) 375, and cases there cited. But while courts may construe their own rules equitably and extend the time therein limited, they have no such power as to statutes, and the decided weight of authority is that when the act is to be done within a time fixed by statute, and the last day thereof falls on Sunday, that day will not be excluded, unless a different rule for computing the time is also provided by statute. *Alderman* v. *Phelps*, 15 Mass. 225; *Ex parte Dodge*, 7 Cow. (N. Y.) 147; *Drake* v. *Andrews et al.*, 2 Mich. 204; *Pearpoint and Lord* v. *Graham*, 4 Wash. C. C. 232, Fed. Cas. No. 10877; *Shefer et al.* v. *Magone*, (C. C.) 47 Fed. 872; *Johnson et al.* v. *Meyers et al.*, 54 Fed. 417, 4 C. C. A. 399; *Hermann* v. *United States*, (C. C.) 66 Fed. 721. While the codes and statutes of most of the states provide for the exclusion of Sunday when it is the last day within which an appeal may be taken or

other act performed under statutory authority, Congress has made no such provision in reference to appeals from any of the federal courts. The fact that it has made such provision specially as to certain other proceedings is to be taken as indicative of its intention to limit the same to those proceedings."

These decisions are in accord with the general rule for computing periods of time limited by statute, unless a different method of computation is expressly provided by the statute. See 3 Am. Jur. 143, Appeal and Error, Section 423, where this general rule is expressed thus:

"As is true in the computation of time generally, in computing the time within which an appeal or error proceeding must be taken, the day on which the judgment or decree was rendered should be excluded, and the last day of the specified period should be included.

"The view has been taken that in determining whether Sunday should be excluded or included in computing time for an appeal, if the time limited exceeds a week, Sunday is included in the computation. For instance, when the last day falls on Sunday, it cannot be excluded and the proceedings taken on the following Monday unless there is some provision showing that it was the intention of the legislature that such day should be excluded. But if the time specified is less than a week, Sunday is excluded."

The above cited cases have been cited and followed as controlling in all of the cases found involving the taking of an appeal on Monday when the last day of the time limited by statute falls on Sunday. See *Siegelschiffer* v. *Penn. Mut. Life Ins. Co.*, (C. C. A. 2) 248 Fed. 226; *Northwestern Public Service Co.* v. *Pfeifer*, (C. C. A. 8) 36 F. 2d 5; *Larkin Packer Co.* v. *Hinderliter Tool Co.*, (C. C. A. 10) 60 F. 2d 491; *Walters* v. *Baltimore & O. R. Co.*, (C. C. A. 3) 76 F. 2d 599; *Walker* v. *Hazin*, (U. S. C. A. D. C.) 90 F. 2d 502, cer-

tiorari denied, 302 U. S. 723, 82 L. Ed. 559; *Frackelton v. United States*, 57 Ct. Cl. 587.

This same rule is applied to situations other than matters of appeal where the time within which an act must be done is limited by statute, the last day of such period falls on Sunday and the party attempts to do the act on the following Monday. See *Marisca v. United States*, (C. C. A. 2) 277 Fed. 727, certiorari denied 257 U. S. 657, 66 L. Ed. 420; *U. S. ex rel. Lutz v. Ragan*, (C. A. 7) 171 F. 2d 788; *In re Yarnoff*, (D. C. N. D. Ill. E. D.) 18 Fed. Supp. 587; *Graf v. United States*, (Ct. Cl.) 24 Fed. Supp. 54; *Ferd. Mulhens, Inc., v. Heggins*, (D. C. S. D. N. Y.) 55 Fed. Supp. 42; *Wyker v. Willingham*, (D. C. N. D. Alabama, S. D.) 55 Fed. Supp. 105; *Yuri Yojima v. United States*, (D. C. E. D. N. Y.) 6 F. R. D. 260.

Thus, it is seen that the general rule is that where a statute limits the time within which action can be taken and the last day of such period falls on Sunday, action on the following Monday is not timely. As shown by the cases cited above, this general rule has been accepted and followed as controlling by the Circuit Courts of Appeals for the Second, Third, Seventh, Eighth, Ninth and Tenth Circuits, and the District of Columbia; also by the Court of Claims and the District Courts for the Northern District of Illinois, the Northern District of Alabama, and the Eastern and Southern Districts of New York. No case has been found holding an appeal to be timely when taken on the Monday which follows the last day of the statutory time for appeal which falls on Sunday.

The Federal Rules of Civil Procedure, Rule 6(a), provide that in the computation of time under these rules, where the last day for performance falls on Sunday or a holiday, performance on the next day which is not a holi-

day or Sunday is timely. This method of computation can only be as broad as the rules which prescribe it, and it is clear that these rules do not govern an appeal from the Supreme Court of Missouri to the United States Supreme Court. Such appeal is covered by the rules of this Court. Rule 36, paragraph 1, expressly provides:

> "An appeal will be out of time unless, within the period fixed by statute, application for allowance is presented to the Judge or Justice who allows it."

As has been pointed out above, the period fixed by statute for this appeal is ninety days; Title 28, United States Code, Section 2101(c). The Rules of this Court make no provision for the taking of an appeal on the following Monday when the last day of the period fixed by statute falls on Sunday. Likewise, there is no such provision in the statute.

As has previously been mentioned, Title 28 has recently been revised, and in such revision the period for appeal fixed by statute was changed from three months to ninety days. This change was made because the ninety day period was considered to be more definite. At the time this change was made the long and unbroken line of decisions discussed above to the effect that the courts could not increase the period fixed by statute for appeal where the last day of such period fell on Sunday by allowing such appeal to be taken on the Monday following, was in existence and it cannot be presumed that either the revisers or Congress was ignorant of such rule. Thus, when this change was made in the interest of definiteness, the change must have been made with this long established rule in mind. When this period of ninety days for appeal is considered together with the above rule and the rule of excluding the first day and including the last, the period

fixed by statute is seen to be as definite as it is possible to establish.

The only case found which does not approve and follow the above rule is *Sherwood Bros., Inc., v. District of Columbia*, (U. S. C. A. D. C.) 113 F. 2d 162, where the statute allowed ninety days within which to file claim for refund with the District of Columbia Board of Tax Appeals. The last day of this period fell on Sunday. On the preceding Friday the claimant learned that its attorney had not filed the claim and was then on vacation. The claimant prepared its own claim and mailed it from Baltimore on Saturday, the eighty-ninth day. In the normal course of things the letter would have been delivered in Washington the following or ninetieth day. However, that day was Sunday and the letter was delivered and the claim filed with the Board on Monday, the ninety-first day. The court held that the filing of this claim was timely. In reaching this conclusion the court mentioned the cases following the general rule as to time for appeal, especially *Walker* v. *Hazin*, 90 F. 2d 502, *supra*, indicated dissatisfaction with the rule, but held that such cases were not controlling. The court pointed out that a matter of administrative procedure was involved, and held that the rules applying to such procedure should not be construed with great strictness against the claimant and the claim was held to be timely. While the opinion raised some question as to desirability of the rule as to time for appeal, the court did not commit itself on the matter, it did not overrule its previous decision in *Walker* v. *Hazin*, *supra*, and decided that such cases were not controlling. One judge dissented on the ground that the general rule as set out in *Walker* v. *Hazin* was controlling and therefore the claim was filed late.

In addition to the *Sherwood case*, *supra*, appellant has cited and relied on *Street* v. *United States*, 133 U. S. 299,

33 L. Ed. 631, wherein this Court construed an act of Congress authorizing the President of the United States, for the purpose of reducing the army after the Civil War, to transfer officers from active duty to the list of supernumeraries and to fill vacancies on the active list with supernumerary officers, on or before January 1. The order under this statute was issued January 2, the first having been a Sunday. This Court stated in its opinion that since the President had power to issue the order up to and including the first and since the first fell on Sunday, the statute would not be construed narrowly and the order of the second would be considered within the power of the President, since Sunday was a *dies non* and the order, to have maximum effect, had to be issued as late as possible.

It should be noted that the question of timeliness was not decisive of the case since the Court found that there were several other grounds on which the validity of the order was sustained, including later ratification by Congress. The Court held that the plaintiff could not recover his army pay for sixteen years during which he was not in service.

This case has been several times advanced as sustaining an appeal taken on Monday when the last day fixed by statute fell on Sunday but it has never been held to be controlling. See *Siegelschiffer* v. *Penn. Mut. Life Ins. Co.*, (C. C. A. 2), 248 Fed. 226; *Walker* v. *Hazen*, (U. S. C. A. D. C.) 90 F. 2d 502; *In re Yornoff*, (D. C. N. D. Ill. E. D.) 18 Fed. Supp. 587; *Ferd. Mulhens, Inc.*, v. *Higgins*, (D. C. S. D. N. Y.) 55 Fed. Supp. 42.

Appellant has also cited and relied on *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 37 L. Ed. 72, which involved the construction of a Texas statute concerning the sale of public lands. This statute provided that when an offer to buy certain land was recorded with the surveyor the pur-

chaser had ninety days within which to make certain payments, etc., and that during such ninety days the land was withdrawn from the market and the surveyor could not accept another offer for that land. In this case the ninety days from a previous offer expired on Sunday and the offer here considered was recorded with the surveyor on the previous Saturday, the 89th day. This Court held that the offer recorded on Saturday was of no effect since it was made within the ninety day period during which the land was withdrawn from the market and the fact that the last day was Sunday made no difference. These facts present the exact converse of the situation under consideration in the case at bar. This case has also been considered by the courts in connection with the timeliness of an appeal and held not to be controlling: *Siegelschiffer* v. *Penn. Mut. Life Ins. Co.*, (C. C. A. 2) 248 Fed. 226; *Ferd. Mulhens, Inc.*, v. *Higgins*, (D. C. S. D. N. Y.) 55 Fed. Supp. 42.

In *Wilson* v. *Southern Ry. Co.*, (C. C. A. 5) 147 F. 2d 165, cited by appellant, the court held that the timeliness of the appeal to the Circuit Court of Appeals was governed by the Federal Rules of Civil Procedure, Rule 6(a). However, the Court pointed out that in the absence of the Federal Rules, which controlled this particular appeal, "the courts with unanimity held that, where the three-month period expired on Sunday, the litigant must take his appeal on or before the preceding Saturday."

Thus, it appears that there is no reason or authority which either requires or indicates the desirability of deviation from the repeatedly enunciated rule that the courts will not extend the time allowed by statute for appeal to include the following Monday when the last day of the period falls on Sunday.

Supreme Court Rule 36 provides that the appeal is out of time unless the application is presented within the period

fixed by statute. This period is 90 days and the application in the case at bar was not presented to the judge who allowed the appeal until the 91st day. Therefore, it is submitted that this appeal is not timely; that the courts have universally held that the time cannot be extended to include the following Monday, and the appeal should be dismissed.

B.

No Substantial Federal Question Is Presented by This Appeal.

This appeal presents no substantial Federal question, and therefore should be dismissed. The question involved in this case is simple and clear cut. Appellant obtained judgment against the appellee on December 8, 1927, at Denver, Colorado, in the District Court for the Second Judicial District of Colorado. This judgment was revived on October 27, 1945, more than seventeen years after its original rendition. Substituted personal service in the Colorado revival proceedings was had upon appellee by registered mail and by delivery by a deputy sheriff of Jackson County, Missouri, at Kansas City, Missouri. The present action on this Colorado judgment, as revived, was filed December 13, 1945, in the Circuit Court of Jackson County, Missouri, at Kansas City. Appellee defended this suit upon the ground that the action was barred by the applicable Missouri statute of limitations, Section 1038, Missouri Revised Statutes, 1939. Judgment of the trial court was for appellee, and the judgment was affirmed by the Supreme Court of Missouri, Division One, by opinion reported at Mo , 213 S. W. 2d 416. Appellant contends that the application of this statute of limitations and consequent denial of recovery constitutes a failure to give full faith and credit to the Colorado judgment as is required by Article IV, Section 1, of the Constitution of the United States.

The Missouri Statute, Section 1038, *supra*, has been held to be a statute of limitations by the Missouri Courts; *Northwestern Brewers Supply Co. v. Vorhees*, 356 Mo. 699, 203 S. W. 2d 422; and *Crane v. Reinking*, Mo. App. , 215 S. W. 2d 759, and as such was applied to the case at bar by the Missouri Supreme Court, which held that this statute, providing that suits on judgments, either domestic or foreign, are barred after ten years from the date of their original rendition, unless revived on personal service within such ten year period, barred the present action on the Colorado judgment. This holding is in complete accord with the decisions of the Supreme Court of the United States in such cases as *McElmoyle* v. *Cohen*, 38 U. S. 312, 10 L. Ed. 177; and *Bacon* v. *Howard*, 61 U. S. 22, 15 L. Ed. 811. Both of these cases have been repeatedly cited from the date of their decision down to the present time; such citation has always been with approval and the cases have been held to be controlling. In the *McElmoyle case, supra*, the Court said:

> "* * * But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution from which it can be even plausibly inferred that the States may not legislate the remedy in suits upon the judgments of other States, exclusive of all interference with their merits. It being settled that the Statute of Limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments is that they are conclusive only as regards the merits; the common law principle, then, applies to suits upon them that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred."

Upon this basis has been built the well established rule of law that the state of the forum will apply its own

statute of limitations to suits upon foreign judgments, and that such action does not contravene the full faith and credit clause of the Constitution of the United States (Article IV, Sec. 1). See 34 C. J. 1110, Judgments, Secs. 1577 and 1578, 52 A. L. R. 567, and 31 Am. Jur. 346, Judgments, Sec. 848, where this general rule is stated thus:

> "As to the operation of the full faith and credit provision, it has uniformly been held that each of the States of the Union may pass a law limiting the time within which an action may be brought on a judgment rendered in another state, without thereby depriving the judgment of the full faith and credit to which it is entitled under the Constitution of the United States * * *."

Since the decision of the Missouri Supreme Court in the case at bar follows and is in accord with the generally accepted doctrine on the subject and with the controlling decisions of the Supreme Court of the United States, it is submitted that the appeal herein presents no substantial Federal question, and should therefore be dismissed.

C.

Appeal Is Not the Proper Method of Securing Review Herein.

This Court has held in *Roche* v. *McDonald*, 275 U. S. 449, 72 L. Ed. 365, and *Morris* v. *Jones*, 329 U. S. 545, 91 L. Ed. 488, that the question of whether or not full faith and credit has been given to foreign judgment does not present a ground for appeal, and that cases involving such questions can only be reviewed by this Court on writ of certiorari. This decision was reached under Section 327 of the Judicial Code (28 U. S. C. A., Sec. 344). The same provisions now appear, without material change, in Sections 1257 and 2103 of Title 28, U. S. C. A. as revised and

effective September 1, 1948. Thus the decision of the two cases just cited should be controlling herein, even though we are now dealing with the provisions of the revised Code.

From a consideration of these cases, it is apparent that appellant has attempted to secure review herein by an unauthorized method, and for this reason the appeal herein should be dismissed.

Under the provisions of Section 2103, Title 28, U. S. C. A., as revised and effective September 1, 1948, the papers herein may be considered as a petition for writ of certiorari, but this does not help appellant. As is stated in paragraph 5 of Rule 38 of this Court, review on certiorari is not a matter of right, but of sound judicial discretion. The decision of the Supreme Court of Missouri in the case at bar is in complete accord with and follows the controlling decisions of this Court, as has been pointed out hereinabove. There is no conflict between this decision of the Missouri Supreme Court and the controlling decisions of this Court nor is there conflict between the decision of the Missouri Supreme Court in the case at bar and the decisions of other State Supreme Courts or of the lower Federal Courts. Under these circumstances, it is submitted that the case at bar does not present a proper occasion for this Court to exercise its discretion and grant the writ of certiorari.

D.

Appellant is in Default in the Matter of His Brief Herein.

Rule 27, paragraph 7, Rules of this Court, provides that "When under this rule an appellant or petitioner is in default, the Court may dismiss the cause." Notice has been received that this case will be argued on March 31, 1949; however, appellant's brief was not received until

March 22, 1949, so that appellee had only eight days in which to answer the arguments of appellant, secure the printing of his brief and forward it to Washington to arrive before the case was argued. It is therefore, submitted that this case presents a proper situation for the application of the above mentioned Rule.

Thus, it is seen that the appeal herein was not timely and this Court is without jurisdiction to consider the case on the merits; the decision of the Supreme Court of Missouri in the case at bar is in accord with the controlling decisions of this Court, and therefore this appeal presents no substantial Federal question, and the case is not one wherein this Court should exercise its discretion to grant certiorari. Also appellant is in serious default as to the time of serving its brief herein. It is therefore, respectfully submitted that this appeal should be dismissed and, treating the appeal as a petition for writ of certiorari, the petition should be denied.

II.

The Missouri Supreme Court Decided, and Properly Decided, That the Colorado Judgment Was and Is Barred Because It Was Not Revived Within Ten Years from the Date of Its Original Rendition.

Section 1038, Missouri Revised Statutes, 1939, provides:

> "Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case

a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

This statute expressly bars the present suit. The judgment against Lamb, upon which this suit is based, was rendered by the Colorado court December 8, 1927, and the period of ten years set out in the above statute had long since passed before the judgment in question was revived or this suit instituted.

The petition pleads a judgment of revival entered October 27, 1945, more than seventeen years after the date of the rendition of the original judgment, but such revival was wholly ineffective to bring the judgment within the first exception of the statute.

To be effective, such revival of the Colorado judgment would have had to have been accomplished within ten years from the date of the original judgment, and then upon personal service.

The statute clearly provides that every judgment shall be presumed to be paid on the expiration of ten years and that no action may thereafter be maintained thereon. This refers to Missouri judgments and foreign judgments. The first exception provided relates to judgments which have been revived on personal service during the first ten year period after rendition.

In the case of *Hedges et al.* v. *McKittrick*, 153 S. W. 2d 790 (Mo. App.), the court said, l. c. 794:

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"The consequences in this case cannot properly be said to be unjust or absurd. The Legislature anticipated the possibility of situations arising in which, as in this case, it might be unjust to limit the time in which a judgment could be enforced strictly within the ten-year period. To avoid such possibilities, the lawmakers therefore, in enacting Section 886, distinctly and specifically provided for an exception whereby the result, which intervenors contend is absurd and unjust, could have been avoided. Intervenors failed to take advantage of the exception which the statute itself provides *by failing to revive the judgments within ten years after their rendition.* While it is true intervenors were not in a position at any time after the rendition of the judgments to have execution levied to collect the same because there never was a sale, there was nevertheless nothing to prevent them from keeping the judgments alive by reviving them within the period required by Section 886, *supra. Under said section intervenors had a complete remedy by revival of their judgments within the ten-year period, and having permitted that period to pass without revival, they are in no position to complain of an absurd result, nor can they properly charge that they have been deprived of their property not only without due process but without any process, as they state it, because they failed to avail themselves of the process which was open to them.*" (Italics ours).

and in the case of *Mayes* v. *Mayes*, 342 Mo. 401, 116 S. W. 2d 1, the court said, 116 S. W. 2d l. c. 3:

"It has several times been held in this state that, a judgment for alimony, whether in gross or payable in periodical installments, is subject to the same incidents as other judgments in actions at law and *becomes dormant ten years after rendition unless kept alive by payments within such period or by revival*" (Italics ours).

and also, l. c. 5:

> "Under said Section 886 *the payment, in order to extend the time, or toll the statute, must be made within the ten year period and must be entered upon the record*" (Italics ours).

And in *Dreyer* v. *Dickman*, 131 Mo. App. 660, the court said, l. c. 665:

> "*An ample remedy is provided in favor of the wife, by a revival of her judgment by scire facias before ten years have elapsed and from one ten year period to another.* That there may be successive revivals to keep a judgment alive so that an execution will issue on it after it has run more than ten years, was decided by the Supreme Court in *Goddard* v. *DeLaney*, 181 Mo. 564, 80 S. W. 886. It is true a judgment like this one is of a continuing character; but we see no reason why it is not essential to revive it in order that it may be enforced by execution after ten years, just as in the case of other judgments" (Italics ours).

This statute contains exceptions and the Missouri courts have held that there are no other exceptions. In *Hedges* v. *McKittrick*, *supra*, the court said:

> "It will thus be seen that our Supreme Court has construed Section 886 [now Sec. 1038] *supra*, to mean exactly what it says and that the only exception to the rule that a judgment 'shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof' are the two exceptions, namely, revival of the judgment or a payment of record made in accordance with the provisions of the statute itself."

Any doubt that may have existed as to the effect of Section 1038 was resolved in a recent decision of the Missouri Supreme Court in the case of *Northwestern Brewers Supply Co.* v. *Vorhees*, 356 Mo. 699, 203 S. W. 2d 422. The

plaintiff in 1946 filed his suit in Missouri upon a Wisconsin judgment rendered on October 31, 1932. The defendant pleaded Section 1038 of the Missouri Statutes, and on motion for judgment on the pleadings the defendant alleged that the Statute of Limitations in Wisconsin ran for twenty years, and that therefore under Article IV, Section 1, of the Constitution of the United States the Wisconsin judgment was entitled to full faith and credit, and the Missouri ten-year statute could not be applied. Defendant also filed a motion for judgment on the pleadings based on the ten-year statute. Plaintiff's petition was dismissed. In commenting upon the effect of the Missouri ten-year statute, the Court said, 203 S. W. 2d l. c. 425:

"However in 1895 the former statute creating a presumption of payment was repealed and a new one enacted in somewhat the present form. Laws, 1895, p. 221. Except in cases of revivor or partial payment entered upon the record a judgment was conclusively presumed to be paid. A further provision was added, namely: 'no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever.' It thus appears the statute joined a conclusive presumption of payment with a limitation on the right to maintain any action and became in effect a statute of limitation. Under such circumstances even an admission the judgment was not paid, if there was one, would not destroy the conclusive presumption and, furthermore, would not remove the bar of the limitation. In *Hedges v. McKittrick*, (Mo. App.) 153 S. W. 2d 790, it was held that nothing is allowed to interrupt the running of Section 1038 against a judgment save some exception found in the section itself.

"Although plaintiff in this case alleged payments were made on the judgment, the term of 10 years expired thereafter and before the institution of the present suit. Therefore, since plaintiff is unable to

bring his judgment under an exception of the statute, the conclusive presumption of payment must follow because the period has run. Furthermore, this action is also barred by the limitation feature of the statute."

On the basis of the foregoing authorities the Missouri Supreme Court in the case at bar held that this suit on the Colorado judgment was barred by the above statute. Had the Court reached any other conclusion it would have amounted to an amendment of the statute to give preferential treatment to foreign judgments. The contention of appellant, if sustained, would, in effect, amend the Missouri statute of limitations to provide that in suits on foreign judgments the statute of limitations of the state which rendered the judgment will be applied by the Missouri courts in suits in Missouri on such judgments. Thus, suit on a foreign judgment, no matter how stale, would not be barred if brought within the period prescribed by the state wherein the judgment was rendered and revived, but judgments rendered by Missouri courts would still be barred by the ten year statute. This was not the intent of the Missouri legislature when it enacted Section 1038, *supra*, and is exactly contrary to the legislative policy as expressed in that statute which treats domestic and foreign judgments precisely alike.

The full faith and credit clause of the Constitution of the United States does not require that this statute be so amended by judicial interpretation and gives no support for the contention of appellant, as is pointed out under point III, *infra*. Therefore, it follows that the Missouri Supreme Court properly held that the present cause of action was barred by the Missouri Statute of Limitations.

III.

The Decision of the Missouri Supreme Court in the Case at Bar Does Not Contravene Article IV, Section 1, of the Constitution of the United States, Is in Accord with the Controlling Decisions of This Court and Should Be Affirmed.

The case at bar was commenced in the Circuit Court of Jackson County, Missouri, at Kansas City, on December 13, 1945. This is a suit on the judgment rendered against appellee in Colorado on December 8, 1927, and revived in Colorado on October 27, 1945. Appellee was not served in Colorado in the revival proceedings, but the revival was on constructive service on appellee in Kansas City, Missouri.

Section 1038, Missouri Revised Statutes, 1939, *supra*, provides that a judgment, either foreign or domestic, shall be conclusively presumed to be paid and no action shall be maintained thereon more than ten years after its original rendition, unless such judgment was revived within ten years on personal service. Thus the present action comes clearly within the purview of this statute and is barred thereby.

The Missouri Statute, Section 1038, *supra*, is a statute of limitations; it has been so held and applied in *Northwestern Brewers Supply Co.* v. *Vorhees*, 356 Mo. 699, 203 S. W. 2d 422; and *Crane* v. *Reinking*, Mo. App. , 215 S. W. 2d 759. In its opinion in the case at bar, Mo. , 213 S. W. 2d 416, the Missouri Supreme Court applied this statute as a statute of limitations and held that plaintiff's cause of action on the Colorado judgment rendered in 1927 and revived in Colorado in 1945 was barred. This holding did not contravene the full faith and credit provisions of Article IV, Section 1, of the Constitution of the United States.

The full faith and credit clause requires that judgments of one state must be given full faith and credit in a sister state, and must be enforced in the sister state to the same extent as would be done in the state which rendered the judgment. However, this applies to the substantive issues that were adjudicated in reaching the judgment, and the courts of the sister state cannot go behind the judgment and re-examine the original cause of action. The full faith and credit clause does not apply to procedural matters such as the Statute of Limitations. Thus, in *McElmoyle* v. *Cohen*, 38 U. S. 312, 10 L. Ed. 177; and *Bacon* v. *Howard*, 61 U. S. 22, 16 L. Ed. 811, the Supreme Court of the United States held that where suit is brought on a foreign judgment, the Statute of Limitations of the State of the forum is applied, and not that of the State wherein the judgment was rendered. The Statute of Limitations is held to affect the remedy only and not the merits of the judgment, and thus the full faith and credit clause does not prevent the application of the local Statute of Limitations. Mr. Justice Wayne, when discussing this matter in *McElmoyle* v. *Cohen*, *supra*, said:

> "* * * But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution from which it can be even plausibly inferred that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits. It being settled that the Statute of Limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments is that they are conclusive only as regards the merits; the common law principle, then, applies to suits upon them that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred."

In *Bacon* v. *Howard, supra*, the Court said:

> "* * * the authenticity of a judgment in another State, and its effect, are to be tested by the Constitution of the United States and acts of Congress. But rules of prescription remain, as before, in the full power of every State. There is no clause in the Constitution which restrains this right in each State to legislate upon the remedy in suits on judgments of other States, exclusive of all interference with their merits. The case of *McElmoyle* v. *Cohen*, 13 Pet. 312, leaves nothing further to be said on this subject."

These cases of *McElmoyle* v. *Cohen*, and *Bacon* v. *Howard, supra*, have been repeatedly cited with approval and followed as controlling by this Court, by the lower Federal Courts and by the various state courts. Citations on this proposition are legion; see, for example, *Townsend* v. *Jemison*, 9 How. 407, 13 L. Ed. 194; *Alabama State Bank* v. *Dalton*, 9 How. 522, 13 L. Ed. 242; *Christmas* v. *Russell*, 5 Wall. 290, 18 L. Ed. 475; *Campbell* v. *Holt*, 115 U. S. 620, 29 L. Ed. 483; *Michigan Ins. Bank* v. *Eldred*, 130 U. S. 693, 32 L. Ed. 1080; *Campbell* v. *Haverhill*, 155 U. S. 610, 39 L. Ed. 280.

On the basis of the *McElmoyle* and *Bacon* cases and the cases following them, together with such earlier cases as *Hawkins* v. *Barney*, 5 Pet. 457, 8 L. Ed. 190; and *Bank of United States* v. *Donnally*, 8 Pet. 361, 8 L. Ed. 974, has been founded the generally accepted and undisputed rule that the state of the forum may apply its own statute of limitations to suits on foreign judgments and that such action does not violate the full faith and credit provisions of Article IV, Section 1, of the United States Constitution. See 34 C. J. 1110, Judgments, Secs. 1577 and 1578, 52 A. L. R. 567. In 31 Am. Jur. 346, Judgments, Sec. 848, this general rule is stated thus:

> "As to the operation of the full faith and credit provision, it has uniformly been held that each of the States of the Union may pass a law limiting the time within which an action may be brought on a judgment rendered in another State, without thereby depriving the judgment of the full faith and credit to which it is entitled under the Constitution of the United States . . ."

The Supreme Court of Missouri recognizes and follows this general rule in the application of its statute of limitations to suits on foreign judgments. See *Northwestern Brewers Supply Co.* v. *Vorhees*, 356 Mo. 699, 203 S. W. 2d 422, where the Court said, l. c. 203 S. W. 2d at 423:

> "Plaintiff's position is that full faith and credit means full faith and credit for the full term of the duration of the judgment under the law of the place where the judgment was obtained, and that the statute of Missouri, where suit was brought on the judgment, prescribing a shorter term violated the full faith and credit clause of the Federal Constitution, and was therefore unconstitutional. We are unable to agree with plaintiff's position and find that a similar contention has been overruled in a number of cases. Anno. 52 A. L. R. 566. See also 11 Am. Jur., Conflict of Laws, Sec. 192; 34 C. J., Judgments, Sec. 1577.
>
> "The plea based on a statute limiting an action on a foreign judgment is one to the remedy, and it is the general rule that the law of the forum will govern rather than that of the place where the judgment was rendered."

The Court then discussed the case of *McElmoyle* v. *Cohen*, 38 U. S. 312, 10 L. Ed. 177, and other decisions of the Supreme Court of the United States and held on this point, l. c. 424:

> "We hold the application of the Missouri 10-year statute of limitations is not contrary to the full faith and credit clause."

This right to limit suits on foreign judgments by the law of the forum is of course restricted by the requirement that such limitation must be reasonable. See *Keyser* v. *Lowell*, (C. C. A. 8) 117 Fed. 400; and *Lamb* v. *Powder River Live Stock Co.*, (C. C. A. 8) 132 Fed. 434. The period of limitations found in the Missouri statute, Section 1038, *supra*, is ten years. This clearly satisfies all requirements of reasonableness, especially when it is remembered that this statute applies with equal force to both domestic and foreign judgments. Judgment creditors who have secured their judgments in Missouri and those who have secured their judgments in any court of record of the United States or of any other state, territory or country, are treated exactly alike.

Missouri, by this statute, has enacted as its policy that suits on all judgments, whether foreign or domestic, are barred ten years after the original rendition thereof, with certain exceptions. This policy is clearly reasonable since it applies with equal force to both domestic and foreign judgments and gives much more than adequate time to any judgment creditor to enforce his judgment and also provides means by which such judgments may be kept alive beyond this ten year period.

Defendant contends that the time limit provided in this statute of limitations should begin to run from the date of the Colorado revival. This entirely ignores the provision of the statute that action on a judgment, either domestic or foreign, must be brought within ten years of its *original rendition*. In considering this question the Missouri Supreme Court, in its opinion in the case at bar, said, 213 S. W. 2d l. c. 419:

> "* * * Definitely, it is the law of this state that a foreign judgment, absent revival, or a payment thereon as provided in Sec. 1038, is barred in 10 years from

the date of its original rendition regardless of what the limitation period may be under the law of the state where the judgment was rendered. *Northwestern Brewers Supply Co. v. Vorhees, supra.* And the only reasonable conclusion to draw is that a revived judgment, domestic or foreign, absent a payment as provided in Sec. 1038, is barred under said section unless the revival was within 10 years from the date of original rendition or, if such is the case, within 10 years from the last revival. In other words, a foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment. This does not run counter to the full faith and credit provision of the federal Constitution, because, as we have seen, the enforcement of a foreign judgment goes to the *remedy* only and that is a matter for the law of the forum."

Thus it is seen that the Supreme Court of Missouri has held that the statute of limitations starts to run on the date of the original rendition of the judgment and does not start to run anew unless the judgment is revived within ten years of such original rendition. Such holding as to when the statute of limitations starts to run involves a purely local matter and does not violate the full faith and credit clause of the Federal Constitution: See *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, where Mr. Justice Gray, speaking for the Court said, l. c. 162 U. S. 339, 40 L. Ed. 991:

"The question at what time the cause of action accrued in this case, within the meaning of the statute of limitations of Iowa, was not a Federal question, but a local question, upon which the judgment of the highest court of the state cannot be reviewed by this court."

It is clear that the revival of the Colorado judgment in Colorado by constructive service on appellee in Missouri did not amount to a new judgment, action on which was not barred by the Missouri statute of limitations, and did not serve to start said statute of limitations running anew on the original judgment rendered in 1927. This question is squarely and conclusively resolved in favor of appellee by the case of *Owens* v. *McCloskey, Executor of Henry*, 161 U. S. 642, 40 L. Ed. 837. In this case the original judgment was rendered in Pennsylvania. The defendant Henry soon moved to Louisiana and lived there until he died. The judgment was revived in Pennsylvania on two returns of *nihil* on *scire facias*. No personal service in the revival proceedings was had on defendant and he did not appear. Suit on this judgment was then brought in Louisiana, where defendant resided. This Court pointed out that this revival merely served to keep alive the lien of the judgment in Pennsylvania and, viewed either as a new judgment or as a continuation of the old one, it would not support the present action. Speaking for the Court, Chief Justice Fuller said:

> "Viewed as a new judgment rendered as in an action of debt, it had no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared. And considered as in continuation of the prior action and a revival of the original judgment for purposes of execution, on two returns of *nihil*, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the *lex fori*, for the same reason."

In this connection see also *Davis* v. *Davis*, (C. C. A. 4) 174 Fed. 786.

In its brief appellant has for the first time raised two points which were not presented to or decided by the court

below. The first is that the form of the judgment is not proper, even if the statute of limitations is properly applied, because under it all rights of appellant are concluded in Missouri and elsewhere by the operation of the doctrine of *res judicata*. The second is that the constructive service had on appellee in the revival proceedings meets all of the requirements of due process. Since these points are raised here for the first time they are not properly in the case and should not be considered by this Court. *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, 57 L. Ed. 393; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 80 L. Ed. 54.

The argument of appellant is based on the assumption that the revival proceedings in Colorado resulted in an entirely new judgment on October 27, 1945; that the ten year period of the Missouri statute of limitations started to run anew on that date, and that nothing behind that date can be considered. This, of course, is contrary to the facts. The proceedings in Colorado were exactly what their name implies, revival proceedings. They did not result in an entirely new and independent judgment, they *revived* the original judgment of December 8, 1927, which has been given another twenty years of life. By this revival the result is the same as if the Colorado statute of limitations on judgments had fixed a period of thirty-seven years, eleven months and eleven days. In either case the judgment would be barred in Colorado on October 28, 1965. In either case it is the judgment of December 8, 1927, which is the basis of the appellant's cause of action in the case at bar, its life in Colorado has merely been extended by the Colorado revival.

If appellant's contention were to prevail it would lead to this anomalous situation: suit on this judgment in Missouri, appellee's domicile, was barred by the Missouri

statute of limitations on December 9, 1937, and appellee could not be thereafter sued in Missouri on said judgment. Then on October 27, 1945, seven years, ten months and eighteen days later, by action in Colorado without personal service on appellee, he again becomes liable to suit on the Colorado judgment of December 8, 1927. As has been pointed out above, this would amount to an amendment of the Missouri Statute of Limitations to provide that the statute of limitations of the state which rendered the judgment, not Missouri, would be applied to suits in Missouri courts on foreign judgments.

That the Colorado revival proceedings did not result in a new and independent judgment but merely gave the original judgment extended life clearly appears, even from the authorities cited by appellant. Thus in 2 Freeman on Judgments, p. 2290, Sec. 1102, 5th Ed., it is said:

> "But a mere judgment of revivor does not otherwise add anything to the efficacy of the original judgment, since it is not a readjudication of the subject matter *but is simply a continuation of that judgment in force and effect*" (Emphasis added).

Kuykendall v. *Tod,* (C. C. A. 8) 219 Fed. 707, is cited by appellant as supporting its position. In this case the court interpreted the Colorado statute of limitations and held that by its provisions it began to run anew when the Wyoming judgment was revived. The question of full faith and credit was not involved. What provisions may be contained in the Colorado statute has nothing to do with the provisions of the Missouri statute of limitations and their proper application. The court here decided the effect of the provisions of the Colorado statute, just as the Missouri Supreme Court decided the effect of the Missouri statute, and since full faith and credit was not in-

volved or considered, the *Kuykendall* case is not authority for the contention of appellant.

The weakness of appellant's position that the Colorado revived judgment is entirely new and stands alone without support from the original judgment of 1927 is demonstrated clearly by the switch which appellant is forced to make in order to try to support the service that was had in the Colorado revival proceedings. In part C of its brief, dealing with service, appellant completely abandons its contention that the revival resulted in a new and independent judgment and points out that there was personal service in the proceedings which resulted in the original judgment in 1927; that the revival was merely a continuation of the original action and not a new action. On this basis the appellant then asserts that the original service in 1927 meets all the requirements of due process and continues so as to satisfy the due process requirements in the revival proceedings.

Thus, it is apparent that appellant wants to have his cake and eat it too; he wants to defeat the Missouri statute of limitations with the theory that a new and independent judgment resulted from the Colorado revival proceedings, and sustain the service in such revival proceedings on the diametrically opposite theory that the revival proceedings are only a continuation of the original action, not a new action. In this connection, it is well to note that appellant states that the Missouri Supreme Court assumed that there was a valid second defense on the matter of service, whereas, in fact, the opinion of the Missouri Supreme Court twice states that the Court expressly refrained from deciding that question and for the purposes of the opinion assumed the service to be vaild. The Court said, l. c. 418:

"... ... We assume, without deciding, for the purposes of this question, that the extraterritorial personal service was valid for revival under Sec. 1038."

and again, l. c. 419:

"Our ruling, *supra*, disposes of this appeal, hence it is not necessary to rule the second defense that the *service* upon defendant for revival of the Colorado judgment was not *personal service* within the meaning of that term in Sec. 1038."

From the foregoing it appears that the Missouri Supreme Court followed the universally recognized rule and the controlling decisions of this Court and applied the Missouri statute of limitations to this suit on a Colorado judgment. In doing so there was no violation of the full faith and credit clause of the Constitution of the United States (Article IV, Section 1), and the decision of the Missouri Supreme Court should be affirmed.

CONCLUSION.

From the foregoing it appears that this Court is without jurisdiction of the appeal because the appeal was not timely and that the appeal should not be allowed because it presents no substantial Federal question. However, in the event this appeal is considered on its merits, it appears that appellant's cause of action was barred by the Missouri statute of limitations and that the Supreme Court of Missouri did not violate the full faith and credit clause of the Constitution of the United States by its application of the Missouri statute of limitations to the case at bar. It is, therefore, respectfully submitted that this appeal should be dismissed, or, if the merits of the case are considered, the decision of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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